



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 38 OF 2020

DANIEL MUTINDA MUIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original judgment of Hon. J. O Magori (SPM) in Makindu

Senior Principal Magistrate's Court SRMCRC (S.O) No. 31 of 2018

issued on 19th December, 2019).

JUDGMENT

1. The Appellant was charged in the magistrate's court with rape contrary to section 3(1) (a) (c) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 24th April 2018 at [Particulars Withheld] village of Kibwezi Sub-county in Makueni county intentionally and unlawfully caused his penis to penetrate the vagina of KM (*name withheld*) by use of force.

2. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act, the particulars of which being that on the same day and place unlawfully touched the vagina of KM with his penis against her will.

3. After a full trial, he was convicted on the main count of rape and sentenced to serve ten (10) years imprisonment.

4. Dissatisfied with the conviction and sentence of the trial court, the Appellant has now come to this court on appeal on the following grounds –

- 1) That the prosecution case is replete with monumental inconsistencies and contradictions which could have attracted acquittal.
- 2) The trial court erred in law and facts by failing to give him a chance to access witness statements.
- 3) The trial court erred in law and facts by supplying him only one witness statement and denied him several witness statements which could have reflected a fair trial under Chapter 4, Article 50(2) (4) of the Penal Code (should be the Constitution).
- 4) That he was compelled and obliged by the court to use Kiswahili language which he was not accustomed to hence prejudiced, subsequently occasioning detrimental administration of justice.

5. The appeal proceeded by way of filing written submissions and both the Appellant and the Director of Public Prosecutions filed their submission, which I have perused and considered.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

7. I have re-evaluated the evidence on record. In proving their case, the Prosecution called five (5) witnesses. Pw1 was the Complainant who stated that she was a very old and did not know her exact age. On night of 23/24-4-2018, as she was sleeping in the kitchen of her house about 4:00 am she felt someone undressing her from the back. That person went ahead to tear and remove her underwear put a piece of wet cloth in her mouth and tried to penetrate her vagina with his penis but since she closed her thighs he ejaculated on her thighs.

8. Pw2 was JK who stated that on the material day at 5:00 am the Complainant went to her house and informed her that she had been raped by someone she did not know and she informed Nyumba Kumi people who proceeded to Complainant's house and found a t-shirt and cap which they said belonged to Mutinda the Appellant who was thereafter arrested.

9. Pw3 was Reuben Muli who was informed about the incident at 7:00 am and with others, proceeded to the Complainant's house where they found a t-shirt and cap, which they identified as belonging to the Appellant. According to this witness, the Complainant had lost her voice and could not talk.

10. Pw4 was Pc. Samson Masese who took over from the original Investigating Officer. He produced the t-shirt and green cap as exhibits. Pw5 was Dr. Anthony Masila who examined the Complainant and noticed bleeding in the vaginal orifice.

11. When put in his defence the Appellant gave unsworn defence statement and said that he was arrested by people outside his home and told that he had been arrested because a t-shirt and a cap resembling his own, were recovered from the home of the Complainant.

12. From the evidence on record there was no penetration in the genitalia of the Complainant since the Complainant stated that she closed her thighs and the assailant ejaculated on her

thighs. Though the doctor Pw5 said that blood stains were seen in the vaginal orifice of the Complainant, there was no evidence to connect the same to sexual penetration on the Complainant, her evidence was that she closed her thighs and the assailant ejaculated on her thighs. Thus if any offence was committed it was attempted rape.

13. Was the Appellant the culprit? In my view the prosecution did not prove beyond any reasonable doubt that the Appellant was the culprit because Pw2 JK to whom the Complainant first reported the incident, said that the Complainant said that she did not know the assailant. In addition Pw3 Reuben Muli who visited the scene clearly stated that they looked for and arrested the Appellant because the t-shirt and cap recovered from the scene resembled that of the Appellant. There is no suggestion anywhere in the evidence that the Appellant was arrested because he was mentioned by the Complainant. In addition I find no evidence on record to prove that the said t-shirt and cap had any special mark that could be pointed out as the clothes of the Appellant. The t-shirt and cap being common items of clothing, I find that they were not positively identified as belonging to the Appellant.

14. In my view, the evidence from the doctor Pw5 Dr. Anthony Masila and entries in the P3 form in which it is said that the Complainant said that she was raped by the Appellant and the police evidence by Pw4 Pc Samson Masese on the identity of the Appellant as the culprit was subsequent to the arrest of the Appellant from the allegation by those who went to the scene and thought that the t-shirt and cap recovered belonged to the Appellant.

15. The evidence on record on the ownership by the Appellant of the t-shirt and cap recovered from the scene was mere evidence of suspicion that those items belonged to him. The items might resemble the cap and t-shirt of the Appellant but the prosecution was duty bound to prove ownership of the items beyond any reasonable doubt which they failed to do. As has repeatedly been said by courts including the case of **Sawe –vs- Republic (2003) KLR 364, wherein the Court of Appeal stated-**

“Suspicion, however strong, cannot provide a basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

16. I thus find that the prosecution did not prove beyond any reasonable doubt that the Appellant was the culprit in this case. On those reasons, the appeal will have to be allowed.

17. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 20TH DAY OF APRIL, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE